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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND C. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

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OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

STATEMENT AS TO JURISDICTION

Roland O. Haines, et al., comprising Keystone Mutual Policyholders' Committee, appellants, joined by Max J. Perks, et al., comprising the Perks' Committee of intervening creditors in compliance with Rule 12 of the Rules of the Supreme Court of the United States submit herewith their statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

The statutory provision believed to sustain jurisdiction is the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. 1257(2).

The judgment appealed from was rendered by the Supreme Court of Pennsylvania, which is the highest court

of the State in which a decision could be had, and there was drawn in question the validity of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789, Secs. 213, 321 and 501-507 incl. (40 P. S. 51, 131, 201-207, incl.) as construed to authorize a summary order by the Court of Common Pleas dissolving a mutual casualty insurance company without notice to the company, its officers or members of intent to apply for such dissolution order and without an order to show cause and full hearing on such application, on the grounds that such statutes as construed and applied deprived appellants of property without due process of law in violation of the 14th Amendment to the Federal Constitution. The decision was in favor of the validity of the statutes as construed.

(b) The Statutes of Pennsylvania, the Validity of Which Are Involved

Section 213 of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 51) provides for the examination of domestic insurance organizations by the Insurance Commissioner and requires that:

> "The Insurance Commissioner shall grant a hearing to the corporation or other insurer or organization examined before filing such report * * *."

Section 321 of the Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789, (40 P. S. 131) provides that:

> "* * * the commissioner shall, in case he finds the capital or reservoir of the company or exchange impaired twenty per centum, give notice to the company or exchange to make good the capital or reserve within sixty days."

Sections 501-507 incl. of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789

(40 P. S. 201-207) provide the method and machinery for the suspension from business, restoration and involuntary dissolution of domestic insurance organizations. Sections 501, 503 and 507 are of no particular significance here except as comprising part of the statutory plan.

Section 502 requires that when the Insurance Commissioner determines a domestic insurance company is insolvent, or otherwise in a hazardous condition, or is being operated in violation of law, he shall communicate the facts to the Attorney General who shall, after hearing, apply to the appropriate court of common pleas for an order to show cause why the organization's business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

Section 504 requires the order to show cause and the papers upon which it is issued, to be served upon the organization in the manner prescribed for the personal service of summons upon a domestic corporation; that in the event the officers of the organization depart, or keep themselves concealed, service of the order to show cause may be in such manner as the court shall direct.

Section 505 provides that on such application or at any time thereafter, the court may in its discretion restrain the organization from the transaction of business or disposition of its property until further order of the court. It requires the court, after a full hearing, to deny the application or direct the Insurance Commissioner to take possession of the property and conduct the business until, on application, after like hearing, it appears that the causes for continued custody shall have been removed.

Section 506 is the dissolution section. It provides in part:

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"If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, * * * such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company * * * as of the date of the order so directing him to liquidate * * *."

The full text of the statutes drawn into question is set out in the appendix.

(c) Date of Judgment and of Application for Appeal

Judgment was entered on December 8, 1952 but did not become final until April 4, 1953 when a timely motion for reargument was denied. The petition for appeal was presented after notice June 29, 1953.

(d) Statement Showing Jurisdiction

A brief statement of the facts is necessary to exhibit the unconstitutionality of the statute.

Cf. *General Oil Co.* v. *Crain*, 209 U. S. 211, 228, 52 L. Ed. 754, 764.

Keystone Mutual Casualty Company, organized in Pennsylvania, had accumulated the surplus of more than one-half million dollars required by statute to write non-assessable policies, and had qualified to do so. (R. 1672a).

In its annual statement as of December 31, 1946, filed with the insurance department of the various states in which it did business, it shows a surplus of $1,439,066.36. (R. 1735 a-1; 1795a).

On May 21, 1947, representatives of the Insurance departments of Pennsylvania, Maryland and Kentucky commenced an examination of the company participated in by three examiners with seven or eight assistants. (R. 885a; 977a; 1344a; 1430a).

Within a few days after the examination commenced Nathan P. Kann, secretary and general manager of the company, and A. J. O'Leary, vice-president, and their attorney called at the office of the Pennsylvania Insurance Commissioner (R. 859a), admitted certain false entries in the company's books which were reflected in its annual report for 1946 (R. 816a) but which increased the reported surplus by only $225,000.00 (see *Commonwealth* v. *O'Leary*, 168 Pa. Super. 569, 572, 79 A. (2d) 789, 790) and that the company was not solvent (R. 816a) but urged that the company could be restored to a technically healthy financial condition before the end of the year by the almost automatic reduction of "run-off" of its unearned premium reserve. (R. 816a et seq.). The Commissioner did not discontinue the examination but suggested ways of raising money to put into the company (R. 819a-822a; 863a; 869a) but did not tell them the amount required (R. 869a).

On June 2, 1947, the Insurance Commissioner of Maryland, before the results of the examination were known, sent telegrams to all of the company's agents in Maryland not to accept any more business for the company (R. 822a) and on June 4, 1947, the Pennsylvania Insurance Commissioner sent Mr. Kann a telegram instructing the company not to write any new or renewable non-assessable policies which was the only type it was authorized to write and for all practical purposes the company was out of business. (R. 823a).

The examiners, finding the claims files at the home office insufficient to establish a proper claim liability on an individual case basis (R. 1816a) as required by Sec. 311 of the Pennsylvania Insurance Department Act as amended (40 P.S. 92) instead of visiting branch offices, substituted a statistical expedient based upon an analysis of only 175 cases out of a total of many thousands (R. 1510a), on that basis concluded that the company's reserve liability and

workman's compensation losses should be increased by an additional $1,511,255.73 (R. 1797a) and on June 6, 1947 arrived at a penciled balance sheet purporting to show that as of December 31, 1946 the aggregate of the company's liabilities and its reserves thus increased exceeded its assets by $1,590,412.15 (R. 1434a). It was then shown to Messrs. Kann and O'Leary who did not testify but were reported by other witnesses to have raised no objection to it, and to have said "you have presented the figures more kindly than I would". (R. 1346a-1348a; 1432a-1433a).

On June 13, 1947, the Pennsylvania Insurance Commissioner wrote to the Attorney General requesting that he proceed under Section 502 of the Pennsylvania Insurance Department Act of May 17, 1921 (P.L. 789) as amended. (R. 1756a).

On June 14, 1947, a notice in the form of a letter addressed to M. D. Hoffman, President of the Company, summoning the Company, its officers and directors to appear for a hearing before the Pennsylvania Department of Justice on June 25, 1947 (R. 1760a) was given to the State police for service upon the officers and directors of the company (R. 300a, 301a). This notice set out that the Department of Justice had been advised by the Insurance Commissioner that the Company

> "* * * is in such condition that further transaction of business by it will be hazardous to policyholders, creditors and the public in that the company has been mismanaged, has been accepting and writing business which no conservative company would write, maintains inadequate claim records, has reported as of December 31, 1946, a surplus when in fact there was a deficit and has issued cash or non-assessable policies beyond the date when the company was possessed of sufficient surplus as required by law (copy of said statement is hereto attached)" (R. 1760a).

The company's license was suspended by the Pennsylvania Insurance Commissioner on June 16, 1947. (R. 878a, 879a).

The report of preliminary examination by the examiners was completed on June 23, 1947. (R. 1431a, 1070a, 1071a).

No copy of the report of examination was sent to the Company or its officers (R. 855a, 856a, 268a), nor was it given a hearing before the filing of the report. It was given no formal notice with respect to the impairment of its reserves, nor was it granted the statutory time to make good the impairment. (R. 231a, 238a).

On June 24, 1947, the company's directors adopted resolutions requesting the Pennsylvania Insurance Commissioner

> "* * * to immediately take charge of the affairs of the Company in order to conserve the assets of the Company for the benefit of all concerned; and it is further resolved that in order to facilitate any action of any person or company to purchase or rehabilitate the Company, the resignation of all of the officers and directors having been submitted to the Company are hereby accepted and are herewith enclosed."
> "AND BE IT FURTHER RESOLVED, That N. P. Kann is hereby authorized and empowered to join with the Insurance Commissioner in behalf of the Keystone Mutual Casualty Company in any legal action necessary for the Insurance Commissioner to take charge of the Company." (R. 1761a; 1840a).

All of the officers had resigned except Mr. J. D. O'Neil, Vice-President whose resignation was to be effective June 30, 1947 (R. 1763a).

At the hearing on June 25, 1947, before a Deputy Attorney General, Hearing Examiner, there were no officers or directors of the Company present (R. 296a). No policyholders or creditors had been notified unless they were officers and had received the letter of June 14th (R. 294a, 295a). The Company was represented at the hearing by

an attorney who had not seen the report of examination, who had no opportunity to examine it, and who understood that the purpose of the hearing was to put the Company in the hands of the Insurance Commissioner for rehabilitation (R. 1765a, 1774a). The evidence submitted consisted of the report of examination and of its identification (R. 1755a-2-1786a). It was at this hearing that the proposal was first made by the Deputy Attorney General representing the Insurance Department that the Company be put into the hands of the Insurance Commissioner for liquidation (R. 1776a). The hearing which lasted less than an hour, was finished about 12:30 (R. 297a). That same afternoon a suggestion was prepared asking the Court of Common Pleas to enter a decree under Section 506 of the Pennsylvania Insurance Department Act of May 17, 1921 (P. L. 789) placing the Company in the hands of the Insurance Commissioner for liquidation (R. 1833a). The attorney for the Company would not agree to the decree nor to any action beyond having the Insurance Commissioner take over because that was the extent of his authority (R. 299a). He signed a joinder waiving issuance of the rule and notice, accepting service, and consenting to the granting of the relief prayed,

> "* * * to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, a copy of which is hereto attached" (R. 1839a).

Neither the attorney nor any representative of the company either urged or agreed that the company be liquidated (R. 303a).

The suggestion was presented to Judge Hargest of the Court of Common Pleas in chambers the following morning. At an informal hearing, lasting not more than one-half hour, of which no record was made, and at which the

Company was not represented, an order was entered dissolving the Company, vacating its charter and directing the Insurance Commissioner to liquidate its affairs (R. 280a; 283a; 285a; 1951a).

The present inquiry was initiated by the successor Attorney General and Insurance Commissioner of Pennsylvania who, after the Company had been re-examined by independent accountants engaged for the purpose, filed a petition to set aside the liquidation decree of June 26, 1947 on the grounds that it was entered as a result of a mistake of fact concerning the solvency of the Company. The petition prayed that the decree be vacated to the extent that it required liquidation of the Company and vacation of its charter; and that the Insurance Commissioner be authorized to present a plan for the Company's rehabilitation (R. 12a-14a). Appellants joined in the prayer of the petition (R. 14a; 194a).

The Commonwealth and appellants contended in the lower court that the Company and its policyholders were deprived of their property without due process of law in violation of the Federal Constitution by the failure to afford to them any, much less adequate, notice of application for a liquidation order as required by Section 506 of the Insurance Department Act; by failure to grant a full hearing on such application as required by that section; by failure to give them an opportunity to inspect and defend at a hearing against the report of special examination as required by Section 213 of the Act; by the failure to afford them the statutory right to repair the alleged reserve deficiencies contrary to the requirements of Section 321 of the Act. Notwithstanding the mandatory nature of these safeguards in the Insurance Department Act, the Court of Common Pleas decided against these contentions (R. 1735a-1739a). Upon appeal, the Supreme Court of

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Pennsylvania Middle District, in response to the challenge that appellants were deprived of their property without due process of law under the Federal Constitution held that there was adequate notice and ample opportunity to be heard in June 1947 and consequently no failure of due process. With respect to the statutory requirements of an order to show cause and full hearing under Section 506 of the Insurance Department Act, it said:

> "In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did not waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the Company."

A timely Motion for Reargument asserted that the statute as construed to authorize the summary dissolution order without both notice and hearing violated the guaranty of due process contained in the Federal Constitution. The necessary effect of the decision by the Supreme Court of Pennsylvania affirming the order of the Common Pleas Court which refused to vacate the liquidation order, as well as its denial of the Motion for Reargument was to affirm the validity of the statute construed and applied to permit entry of a liquidation order without opportunity to resist it. Appeal was taken to this Court.

(e) Authorities Believed to Sustain Jurisdiction

28 U. S. C. 1257.

A Federal question affording a jurisdictional basis for review by the Supreme Court was presented by the attack

on the validity under the 14th Amendment to the Federal Constitution of the State statutes as construed and applied to permit the entry of a liquidation order without opportunity to resist it, and the decision of the highest State court gave effect to the statutes as so construed and applied.

Myles Salt Company v. *Board of Commissioners of the Iberia & St. Mary Drainage District,* 239 U. S. 478, 36 S. Ct. 204, 60 L. ed. 342;

Fiske v. *Kansas,* 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108;

Darling v. *Newport News,* 249 U. S. 540, 39 S. Ct. 371, 63 L. ed. 759;

Dahnke-Walker Milling Company v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239;

Appeal is the proper procedure for review.

Standard Oil Co. of Cal. v. *Johnson,* 316 U. S. 481, 62 S. Ct. 1168, 86 L. ed. 1611;

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. ed. 1229.

(f) Authorities Showing That the Questions Are Substantial

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 94 L. ed. 865, 873 and cit.

The notice must be of such nature as reasonably to convey the required information.

Mullane v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 94 L. ed. 865, 873;

Grannis v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. ed. 1363;

DeLucca's Liquor License Case, 124 Pa. Super 500.

The only formal notice that the Company or anyone connected with it received prior to the hearing before the Trial Examiner on June 25th was the letter of June 14th directed to the President of the Company. It was based upon a request by the Insurance Commissioner that the Attorney General proceed under Section 502 of the Pennsylvania Insurance Department Act which provides for the Insurance Commissioner to take possession of its property and "conduct its business." Liquidation is provided by a separate section of the Act.

The complaints set out in the letter covered a much wider field but were no more specific than that condemned in *Morgan* v. *United States*, 304 U. S. 1, 19, 58 S. Ct. 773, 83 L. ed. 1129, 1133, where the notice was of an inquiry into the reasonableness of rates charged by a sheep commission company for stockyard services at Kansas City. The acts of mismanagement referred to were not specified. The nature of the business which the company had been accepting and writing, which no "conservative" company would write was not set out. The inadequacy in the claim records was not indicated. The complaints that the Company had reported as of December 31, 1946 a surplus when in fact there was a deficit and had issued cash or non-assessable policies beyond the date when the company was possessed of sufficient surplus as required by law was based wholly upon the findings of examiners, who adopted a statistical expediency to arrive at their conclusions, and whose report, which was not even completed until June 23rd, was never furnished or made available to the Company in advance of the hearing. It had no chance in advance of the hearing to examine and meet the preliminary data upon which

the Insurance Commissioner's and Hearing Examiner's conclusions were founded sufficient to enable it to point out any errors which existed.

U. S. ex rel St. Louis Southwestern Railway Company v. *Interstate Commerce Commission*, 264 U. S. 64, 79, 44 S. Ct. 294, 68 L. ed. 565, 569;

Morgan v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129.

The first information conveyed to any representative of the Company that it was to be put in the hands of the Insurance Commissioner for liquidation under Section 506 of the Insurance Department Act, a separate and distinct statutory proceeding, was at the hearing on June 25th. There still had been no opportunity to study and meet the report of examination. The attorney for the Company, whose authority was limited to acquiescing in the custody of the Company by the Insurance Commissioner for rehabilitation, limited his joinder in accordance with his authority, of which counsel for the Commonwealth and the Court had notice. There was no chance afforded to resist the shift in the proceedings from custody for purposes of rehabilitation to liquidation, adopted without warning, and executed summarily within the space of twenty-four hours. Such action has been condemned as an exercise of arbitrary power, at variance with "the rudiments of fair play" long known to our law. The Fourteenth Amendment condemns such methods and defeats them.

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 70, 71, 55 S. Ct. 315, 79 L. ed. 761, 769;

Re William Oliver, 333 U. S. 257, 272, 273, 68 S. Ct. 499, 92 L. ed. 682, 694;

Cole v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. ed. 644;

Cooke v. *United States*, 267 U. S. 517, 538, 45 S. Ct. 390 69 L. ed. 767, 774.

The informal and casual notice of the claim by the examiners that the Company was insolvent, given on June 6th to Messrs. Kann and O'Leary by showing them a penciled balance sheet, unaccompanied by the detail of a report of the examination, did not meet the requirements of due process. These were the officers who had admitted falsifying the records, thereby deceiving the policyholders and creditors; their interests were no longer the same. As they were subject to prosecution they might derive some personal benefit from cooperating with the Insurance Commissioner. Notice to an adversary does not comply with due process.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 316, 70 S. Ct. 652, 94 L. ed. 865, 874.

Even if the penciled statement shown to the defaulting officers were sufficient to put the Company on notice of the claim that it was insolvent, the Company had the right to assume that it would be afforded the sixty days' notice to make good its capital or reserve provided by Section 321 of the Pennsylvania Insurance Department Act, and that it would not be liquidated without the order to show cause and full hearing required by Section 506 of that Act.

City of New York v. *New Haven & Hartford Railroad*, Company, Decided Jan. 12, 1953 — U. S. —, 97 L. Ed. (Advance p. 268, 271).

However such extra-official or casual notice cannot be deemed a substantial substitute for the due process of law that the Constitution requires.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 35 S. Ct. 625, 59 L. ed 1027, 1032;

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 315, 70 S. Ct. 652, 94 L. ed. 865, 874.

Even such information as may have reached the Company through extra-official or casual notice, through the letter of June 14th, or at the hearing on June 25th did not afford a reasonable time for those interested to take any effective action. The examination of the Company commenced on May 21, 1947, although participated in by three examiners and seven or eight assistants, was not completed until June 23, 1947. It was upon this report of examination, never even shown to the Company's representative until the hearing before the Attorney General June 25, 1947 held to determine whether the Insurance Commissioner should take possession of the Company's affairs, that the penciled balance sheet, the letter of June 14th and the hearing on June 25th were based. Obviously time was not afforded to peruse the report of examination; much less to determine its accuracy. And the dissolution of the Company which was not even suggested until June 25th, was an accomplished fact twenty-four hours later. Thus another fundamental requirement of due process of law was violated. The notice must afford reasonable time for those interested to make their appearance.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 70 S. Ct. 652, 94 L. ed. 865;

Roller v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. ed. 520;

U. S. ex rel Turner v. *Fisher*, 222 U. S. 203, 32 S. Ct. 37, 56 L. ed. 165;

Hovey v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. ed. 215;

DeLucca's Liquor License Case, 124 P. Super. 500;

Armour Transportation Co. v. *Pennsylvania Public Utility Comm.* 138 Pa. Super. 243;

Commonwealth v. *O'Keefe*, 298 Pa. 169.

There was no need for such unseemly haste. The Company had been notified on June 2nd to cease writing the only type of policies it was then authorized to write. Its license had been suspended on June 16th. It could have been controlled by placing it in the hands of the Insurance Commissioner without dissolution, under Section 502 of the Pennsylvania Insurance Department Act and by injunction, if necessary, under Section 505 of the same Act. The scheme of the statute itself contemplated a hearing before the filing of the special report of examination (Section 213) and at least sixty days during which the Company could make good any impairment of its capital or reserve (Section 321).

Cf. Southern Railway Company v. *Virginia, ex rel. Shirley*, 290 U. S. 190, 197, 54 S. Ct. 148, 78 L. ed. 260, 265.

There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement of due process has been neglected or ignored.

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 305, 57 S. Ct. 724, 81 L. ed. 1093.

The fact that all of the officers and directors of the Company except one had resigned prior to the hearing on June 25th did not dispense with the necessity of notice of the abrupt shift to a proceeding for liquidation under Section 506 of the Act but made the need for some sort of notice to the policyholders even more apparent. The resignation of the officers and directors did not effect a dissolution of the Company.

Comm. v. *First National Bank of Easton*, 303 Pa. 241;
Rose v. *Turnpike Co.*, 3 Watts (pa) 46;
Rachiele v. *Marsico*, 303 Pa. 372;
Comm. ex rel. Claghorn v. *Cullen, et al.*, 13 Pa. St. 133.

The names and addresses of the policyholders were known to the Commonwealth or available to it. Where it was obvious that in this proceeding for liquidation which was to be accorded finality there had been no notice reasonably calculated under all the circumstances to apprise the policyholders of the impending dissolution of the Company, and where their names and post office addresses were at hand, there was no reason for not resorting to the mails by which a notice, likely to reach most, would have safeguarded the interest of all as a class.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 318, 70 S. Ct. 652, 94 L. ed. 865, 875.

Apparently on June 27, 1947, the day after the dissolution decree, facilities were available to the Commonwealth to notify policyholders, creditors and all parties interested in the Company of its dissolution and of the order barring claims after June 25, 1948 (R. 1945a).

It was within the authority, and was the obligation of the Court to direct some other adequate manner for service of the order to show cause if the officers of the Company were not available. Sec. 504, Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789 as amended (40 P. S. 204).

In view of the complete failure of adequate and timely notice, the informal conference of 30 minutes in Judge Hargest's chambers at which no testimony was taken and no record made, and at which neither the Company, its policyholders or creditors were represented, was not the fair and open hearing required by due process of law; it was a pretense and a sham. Again there was violated a fundamental concept of due process.

Palko v. *Connecticut*, 294 U. S. 70, 71, 58 St. Ct. 149, 82 L. ed. 288, 293 and cit;

United States v. *Abilene & Southern Railway Company*, 265 U. S. 274, 288, 289, 44 S. Ct. 565, 68 L. ed. 1016;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. ed. 431, 434.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.

Ohio Bell Telephone Co. v. *Public Utilities Commissioner of Ohio*, 301 U. S. 292, 304, 305, 57 S. Ct. 724, 81 L. ed. 1093, 1101, 1102;
Railroad Commission of Colorado v. *Pacific Gas & Electric Co.*, 302, U. S. 388, 393, 58 S. Ct. 334, 82 L. ed. 319, 322.

In holding that "it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing * * *" the Pennsylvania Supreme Court, by construction and application, has effectively denuded the Pennsylvania Insurance Department Act of the fundamental requirements of due process of law which it considered so essential in *National Auto Corporation* v. *Barford*, 289 Pa. 307. By so doing, it has deprived appellants as well as the Company and all other policyholders and creditors of those fundamental rights guaranteed under the due process clause of the Federal Constitution.

So much of the order of June 26, 1947, as provided for the dissolution of the company and the vacation of its charter, having been entered without the notice and hearing required by due process, is void and of no effect.

Interstate Commerce Commission, v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431;
Smith and Springer, admr. v. *Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357;

Griffin v. *Griffin*, 327 U. S. 220, 66 S. Ct. 556, 90 L. ed. 635;
Lancaster and Mintzers Appeal, 111 Pa. 524;
Vichosky v. *Boucher*, 162 Pa. Super. 598;
Manlin v. *Tener*, 146 Pa. Super. 593;
Shambo v. *D & H. R. R. Co.*, 288 Pa. 240, 245;
Hughes v. *Hughes*, 306 Pa. 75.

Accordingly, the heavy burden placed upon the petitioners and intervenors in the action to set aside the dissolution order was improperly cast. Whether after notice and a full hearing which complies with due process, the same result would be reached need not be considered here. It is no answer to one who protests against the taking of his property without due process of law that due process of law would have led to the same result.

Coe v. *Armour Fertilizer Works*, 237 U. S. 314, 424, 35 S. Ct. 625, 59 L. ed. 1027, 1032;
Rees v. *Watertown*, 86 U. S. (19 Wall.) 107, 123, 22 L. ed. 72, 77.

The Supreme Court of Pennsylvania in addition to holding that the officers and directors of the Company had adequate notice of the hearing, appears to also rely upon the non-Federal ground of waiver of "the technical requirements of the Insurance Code." This ground is so plainly untenable that it may not be used to defeat the jurisdiction of the Supreme Court of the United States.

Ward v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751;
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine et al. v. *Michaux*, 279 U. S. 737, 49 S. Ct. 483, 73 L. ed. 931;
Williams v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 353, 89 L. ed. 398;
Magwire v. *Tyler*, 75 U. S. (8 Wall. 650, 19 L. ed. 320.

The proceedings had been custodial only until the hearing on June 25th. There was no prior notice of the proposalto proceed under Section 506 for the dissolution of the Company. As there was no warning of the shift of the custodial proceedings into an effort to liquidate the Company, so also there was no consent to it. Acquiescence in the loss of fundamental rights will not be presumed.

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093, 1103.

The resolution of the directors on June 24th spelled out their understanding and purpose. They were requesting the Insurance Commissioner to immediately take charge of the affairs of the Company "in order to conserve the assets of the Company for the benefit of all concerned." They were resigning "in order to facilitate any action of any person or company to purchase or rehabilitate the Company." Accordingly, they authorized a joinder in behalf of the Company with the Insurance Commissioner "in any legal action necessary for the Insurance Commissioner to take charge of the Company."

The joinder signed by the Company's attorney to the suggestion praying that the Company be placed in the hands of the Insurance Commissioner for dissolution consented to the granting of the relief prayed for only "to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, copy of which is hereto attached." He specifically stated that the farthest he could agree was to go along on having the Insurance Commissioner take over, because that was what the resolution stated "and that is what my authority is". He could not agree to the decree (R. 299a). The undisputed testimony of the Deputy Attorney General who represented the Insurance Commissioner

at the hearing on June 25, 1947 and who originated the idea of dissolution and prepared the suggestion and joinder was that neither the attorney nor any representative of the Company either urged or agreed that the Company be liquidated; quite the contrary, they were insistent they could get more money and put the company in good shape (R. 302a, 303a).

There was no doubt between the parties at the hearing with respect to the limited authority of the Company attorney and the meaning of the resolution. There can be none now, both because of the plain language of the resolution and the undisputed evidence. But however the State Court may seek authority to sustain its action, it cannot derive it from the officers or directors, for they had no authority to consent to the dissolution of the Company or to waive it into extinction.

Sec. 339. Pennsylvania Insurance Company Law of May 17, 1921, P. L. 682 (40 P. S. 460);
Temperance Association v. *Friendly Society*, 187 Pa. 38;
Bedford Railroad Co. v. *Bowser*, 48 Pa. 29;
Comm. ex rel. Claghorn et al. v. *Cullen, et al.*, 13 Pa. St. 133, 141;
Baker's Appeal, 109 Pa. 461.

The State Supreme Court also suggested a failure to object to the decree "for a period of over 3½ years" apparently not as a separate non-Federal basis for its decision, but to indicate a lack of faith in the constitutional objections. If considered as a non-Federal ground for the decision it is equally untenable. The Matlack Committee of policyholders intervened on June 2, 1948. The appellant policyholders committee, which succeeded the Matlack Committee intervened in a timely fashion to continue its challenge.

Comm. ex rel Chidsey v. *Keystone Mutual Casualty Co.*, 366 Pa. 149.

That petition was still pending on December 18, 1950, when the Attorney General and Insurance Commissioner challenged the validity of the dissolution decree.

When the class was thus represented, it was not essential that each member of the class intervene in the action in order to be free from laches. Nor, where due diligence was used, would failure, long continued, to discover the appropriate remedy establish laches.

Southern Pacific Company v. *Bogert*, 250 U. S. 483, 489, 39 S. Ct. 533, 63 L. Ed. 1099, 1106.

(g) Time and Method of Raising the Federal Question

The Commonwealth and appellants contended in their argument before the lower court en banc that the Company, its policyholders and creditors were denied procedural due process of law in violation of the Fourteenth Amendment to the Federal Constitution by the failure to accord to them any, much less adequate, notice of application for liquidation order as required by Section 506 of the Insurance Department Act, by the failure to grant them a full hearing on such application as required by the same section, by the failure to grant the hearing to the corporation required by Section 213 of the Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 51) and by the failure to grant it the sixty days to repair alleged reserve deficiencies required by Section 321 of the same Act (40 P. S. 131). It was also contended there that the Company and its member policyholders and creditors were deprived of their property without due process of law by the dissolution decree of June 26, 1947 because it was entered without compliance with the notice and hearing provisions of Section 506 of the Insurance Department Act of May 17, 1921, P. L. 789 (40 P. S. 206). The lower court considered these questions and decided them against the Commonwealth (R. 1735a-1739a).

On appeal to the Supreme Court of Pennsylvania, appellants again asserted that the decree of liquidation of June 26, 1947 violated the applicable statutes and was a denial of due process of law, to the prejudice of appellants' rights, pointing out that Sections 502 and 5-6 of the Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789 (40 P. S. 202, 206) "are constitutional only because they contain the carefully stated provisions outlined above, for the issuance of the order to show cause, for its service and the service of the Attorney General's pleading upon the respondent company, and for a full hearing before the Court" (Brief for Appellant in Supreme Court of Pennsylvania, Middle District, pp. 33-49). The Supreme Court of Pennsylvania decided these questions against the contention of appellants. It held that there was adequate notice and ample opportunity to be heard in June, 1947, and consequently no failure of due process; that the statutory provisions under which the court acquired the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it had either been complied with or that these "technical requirements of the Insurance Code" had been waived by the officers and directors of the company.

This necessarily constituted a decision that the Act as construed and applied, was valid against the constitutional objection.

Appellants in their Motion for Reargument asserted that the Pennsylvania Insurance Department Act of May 17, 1921, as construed by the Supreme Court of Pennsylvania to permit a summary order of liquidation without notice of the proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties and an opportunity to be heard violated the guaranty of due process of law contained in the Federal Constitution. In denying

the Motion for Reargument on April 4, 1953 the Supreme Court of Pennsylvania necessarily considered and passed on the question against the contention of appellants.

ELLIS G. ARNALL,
CLEBURNE E. GREGORY, JR.,
WALTER M. NEWMAN,
Counsel for Appellants.

ARNALL, GOLDEN AND GREGORY,
WALKER AND NEWMAN,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED DECEMBER 8TH, 1952

No. 27 May Term, 1952

In re: COMMONWEALTH OF PENNSYLVANIA Ex Rel. T. McKEEN CHIDSEY, Attorney General

v.

KEYSTONE MUTUAL CASUALTY COMPANY: KEYSTONE MUTUAL POLICYHOLDERS' COMMITTEE, Intervenor; WILLIAM GOLDSTEIN, et al., Intervenors; MAX J. PERKS et al., Intervenors; CLAUDE B. HANLEY, Ancillary Receiver of the State of Maryland, Intervenor; and KURT HITKE AND COMPANY, et al., Intervenors

Appeal of Keystone Mutual Policyholders' Committee from the Final Order of the Court of Common Pleas of Dauphin County, Pennsylvania, March 17, 1952, at Commonwealth Docket No. 129 of 1947

OPINION OF THE COURT

BELL, *J.*:

An appeal was taken to this Court from the dismissal by the Court below, on March 17, 1952, of a petition to vacate a decree of Court made on *June 26, 1947*. That decree was unappealed from and unchallenged for a period of approximately three and one-half years, during which time the Keystone Mutual Casualty Company was in the hands of the Insurance Commissioner of Pennsylvania for purposes of liquidation in accordance with the Court's decree. The decree of June 26, 1947 has been recognized ever since its entry by 26 of our sister states which have accorded it full faith and credit in accordance with Article IV, Sec. 1 of the Constitution of the United States.

This case originated in June 1947 in a statutory proceeding, initiated by the Attorney General of Pennsylvania at

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• P.L. 789, 40 PS 202-206.

the relation of the Insurance Commissioner of the Commonwealth, for the dissolution of the Keystone Mutual Casualty Company, a Pennsylvania casualty insurance company, pursuant to the provisions of Secs. 502-506 of the Insurance Department Act of May 17, 1921. On June 26, 1947, the Court of Common Pleas of Dauphin County entered a final decree directing the Insurance Commissioner to take possession of the company's property and ordering the dissolution of the company and the liquidation of its assets.

Three and one-half years later, to-wit, on December 18, 1950, the succeeding Attorney General and the succeeding Insurance Commissioner petitioned the Court of Common Pleas of Dauphin County to vacate its decree of June 26, 1947, *on the ground that it was entered under a mistake of fact.* Various parties were permitted to intervene in the proceedings in the Court below. See *Commonwealth ex rel. Chidsey v. Keystone Mutual Casualty Company*, 366 Pa. 149 76 A. 2d 867. The petition to vacate was supported by a "Policyholders' Committee"; it was opposed by a committee of creditors called the "Goldstein Committee" and by the Insurance Commissioner of Maryland, and by insurance agents from the State of Illinois who were creditors and known as the "Hitke Committee."

The Commonwealth in its petition to vacate alleged (1) that the Casualty Company was solvent (a) on June 26, 1947, and (b) as of the time of the filing of the petition of December 18, 1950; and (2) that the vacation of the decree of June 26, 1947, was sought for the purpose of rehabilitation of the company. No plan of rehabilitation was attached to the petition or offered at the trial and the Court below doubted that an acceptable plan could, under all the conditions here present, be devised. Judge Neely, after lengthy hearings, found in a very able and painstaking opinion of 97 pages; (1) that the decree of dissolution of June 26, 1947 was validly entered; (2) that the Commonwealth and the intervenors who supported the petition to vacate the decree of 1947 had the burden of proving that the decree was entered under a mistake of fact or law; and (3) that the petitioners failed to sustain their burden of proof. The "Policyholders' Committee" took an appeal from the decree of the

Court below which dismissed the Commonwealth's petition to vacate, but the Commonwealth, which was the original petitioner, refused to take an appeal or to join in this appeal. The Insurance Commissioner in his answer to a petition for supersedeas, doubts whether a rehabilitation of the company could not be consummated even if the company were solvent, and avers that "he believes that compliance with (the) admonitions (of the Court below) is in the best interest of the public and of the company, its creditors and policyholders and will not adversely affect the interest of any of them and that further delay would be subversive of the interest of the public, policyholders, creditors and claimants". Briefs were filed in support of the appellant by the "Perks Committee"; and in opposition to the appellant's position by the "Goldstein Committee" and by the "Hitke Committee."

The appellant intervenors contend that the decree of June 26, 1947, was void (1) because it was based upon a mistake, viz., insolvency, and (2) because it was entered without the required notice or hearing, and (3) because the Court erred in placing the burden of proof of solvency on the Commonwealth.

From the record and briefs totaling more than 2000 pages, we briefly summarize the important facts.

The principal place of business of the Keystone Mutual Casualty Company was in Pittsburgh, Pennsylvania. As of December 31, 1946, the company was writing 19 different classes of casualty insurance and had approximately 1000 agents who were operating in 26 states in which the company was authorized to do business. From this business it derived net premiums in 1946 in excess of 7½ million dollars. In its annual statement filed with the Insurance Department of the Commonwealth, as well as with the Insurance Department of other states, the company reported a surplus as of December 31, 1946, of $1,439,066.36. This report aroused the suspicions of the officers of the Insurance Department of Maryland and of the Insurance Director of the State of Kentucky, who called certain items in the report and certain practices of the company which they considered unsound and improper to the special attention of the Insurance Com-

missioner of Pennsylvania. In May of 1947, the Insurance Commissioner directed that a special examination should be made of the Keystone Mutual Casualty Company, which was joined in by examiners representing the Insurance Commissioner of Kentucky and of Maryland. Shortly after the examination was begun, N. P. Kann, Secretary, Director, Chairman of the Finance Committee, and the active Manager of the company, and A. J. O'Leary, Vice-President, Director and Comptroller of the company, came with the company's attorney to the office of the Insurance Commissioner in Harrisburg to discuss the company's affairs. During the course of this conference with the Insurance Commissioner *both Kann and O'Leary admitted that the company was insolvent.* They also admitted that the annual statement of December 31, 1946, deliberately concealed the extent of the company's liabilities; thus enabling the company to show a surplus. Kann requested the Insurance Commissioner to discontinue the examination and to permit the company to operate for the balance of the year in the hope that the company could "run off" the bad debts on its books before the regular examination which would be held on or about January 1, 1943. The Insurance Commissioner refused to discontinue the examination and insisted that additional funds must immediately be raised, otherwise the company would be taken over by the Insurance Department. He also notified the District Attorney of Allegheny County of the criminal acts of Messrs. Kann and O'Leary. The officers and directors were unable to borrow additional funds to bring the reserves up to the legal requirements and to rehabilitate the company. Kann and O'Leary were convicted in Allegheny County on a criminal charge arising out of the falsification of the company's books. On June 1, 1947, the Insurance Commissioner of Maryland ordered the company to cease doing business in that state. Upon being informed of this action, the then Insurance Commissioner of Pennsylvania, Mrs. James F. Malone, Jr., on June 2, 1947, prohibited the writing of any new business.

On June 6, 1947, the Insurance Commissioner's examiners (as a result of their examination and preliminary report) reported to the Commissioner and also to Messrs. Kann and

O'Leary that they found the company was insolvent, and that it had a deficit of over 1½ million dollars. *Mr. Kann said he could not object to the examiner's findings; Mr. O'Leary admitted that "you have presented the figures more kindly than (I) would."* On June 13, 1947, Mr. Malone prohibited the company from doing any further business and notified the Attorney General that the company *had a deficit of $1,590,412.15 and because of its mismanagement was in a hazardous condition.* On June 14, 1947, pursuant to the request of the Insurance Commissioner, the Department of Justice of the Commonwealth sent the following notice to the President of this company:

"Sir:

The Insurance Commissioner of Pennsylvania has advised this office under date of June 13, 1947, that the Keystone Mutual Casualty Company, Pittsburgh, Pennsylvania, of which you are President, is in such condition that *further transaction of business* by it *will be hazardous* * to policyholders, creditors and the public in that the company has been mismanaged, has been accepting and writing business which no conservative company would write, maintains inadequate claim records, *has reported as of December 31, 1946 a surplus when in fact there was a deficit* and has issued cash or nonassessable policies beyond the date when the company was possessed of sufficient surplus as required by law (copy of said statement is hereto attached.)

The Company is summoned to appear for a hearing before this department. The date, time and place of hearing is fixed for June 25, 1947, at 11:00 A.M.D.S.T., Conference Room, Department of Justice, Second Floor, Main Capitol Building, Harrisburg, Pennsylvania, when and where the officers of the company, you and Messrs. N. P. Kann and E. J. Kann, D. L. McLay, A. J. O'Leary and J. D. O'Neil are directed to appear in person with whatever records you may desire to produce at that time and accompanied by any witnesses

* Italics throughout, ours.

you may desire to testify. You may be represented by counsel in this matter as may the other officers of the company. Testimony will be taken at this hearing.

Yours very truly,

GEORGE W. KEITEL,
Deputy Attorney General."

On June 24, 1947, the Board of Directors of Keystone Mutual Casualty Company, adopted the following Resolution:

"Whereas, the Company has been advised that the reserves of the Company do not meet the legal requirements of the Insurance Department of the Commonwealth of Pennsylvania; and

Whereas, the Company has made *many efforts* to raise sufficient moneys to bring the reserves up to the legal requirements; and

Whereas, the Company has been unable since it was notified that its reserves were inadequate to raise the additional moneys necessary to bring the reserves of the Company up to the legal requirements; and

Whereas, the Company has been ordered not to do business except the right to collect premiums and cancel policies;

Now, therefore, upon motion of N. P. Kann, seconded by S. M. Hartman, be it resolved that the *Insurance Commissioner* of the State of Pennsylvania *is hereby requested to immediately take charge of the affairs of the company in order to conserve the assets of the Company for the benefit of all concerned;* and it is further resolved that in order to facilitate any action of any person or company to purchase or rehabilitate the Company, the resignation of all of the officers and directors having been submitted to the Company are accepted and are hereby enclosed.

"AND BE IT FURTHER RESOLVED, *That N. P. Kann is hereby authorized and empowered to join with the Insurance Commissioner in behalf of the Keystone*

Mutual Casualty Company in any legal action necessary for the Insurance Commissioner to take charge of the Company.

Dated June 24, 1947."

The hearing before the Attorney General on June 25th was attended by counsel representing the Keystone Mutual Casualty Company, by a representative of the Insurance Commissioner of Pennsylvania, and by representatives of the Insurance Commissioners of five states, at which time it was discovered that in accordance with the Resolution of June 24, 1947, all of the officers and directors of the company except one Mr. O'Neil, had submitted their resignations to the Insurance Commissioner to be effective on June 24, 1947; Mr. O'Neil's resignation was also delivered, but was to be effective as of June 30, 1947. The Attorney General notified those present at this hearing that he intended to petition the Court for *liquidation* of the company.

Following this hearing the Attorney General filed a Suggestion, sworn to by the Insurance Commissioner, in the Court of Common Pleas of Dauphin County, setting forth that there was a deficit of more than 1½ million dollars and continued operation of the business would be hazardous to the policyholders, creditors, and to the public, and requested that the company be placed in the possession of the Insurance Commissioner for purpose of dissolution. *At no time did a director or officer of, or attorney for, the corporation, deny the insolvency of the corporation or object to the company's being placed in the possession of the Insurance Commissioner for liquidation.* Moreover, the attorney for the company on June 25, 1947, joined in writing in the prayer of the Suggestion and *waived* the issuance of a rule and notice *and consented to the granting of relief prayed for* "to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, . . ." a copy of which was attached to the waiver.

On June 26, 1947, after an informal hearing in the chambers of Judge Hargest, the following order and final decree of dissolution was entered:

"ORDER AND FINAL DECREE

"And now, June 26, 1947, it appearing to the Court that the Attorney General of the Commonwealth of Pennsylvania, at the relation of the Insurance Commissioner of the Commonwealth, has filed herein a Suggestion dated June 25, 1947, praying for a Rule upon the Keystone Mutual Casualty Company, its agents, officers and employees, enjoining and restraining them from transacting any of the business of said Company or disposing of any of its property, and enjoining and restraining all persons from instituting or prosecuting any actions at law or in equity against Keystone Mutual Casualty Company and directing Keystone Mutual Casualty Company to show cause why its business should not be closed and the Insurance Commissioner of the Commonwealth of Pennsylvania should not take possession of its property and conduct its business, and after full hearing by said court to order that said Keystone Mutual Casualty Company be dissolved, its charter vacated and its corporate existence ended, and its business and affairs liquidated by and under the direction of the Insurance Commissioner and for such other relief as the nature of the case and the interest of its policyholders, creditors and the public may require; and it further appearing that prior to the issuance of the said Rule the said Keystone Mutual Casualty Company, appeared by its attorney, *waived the issuance of the Rule*, accepted service of the same, *and consented to possession of the company by the Insurance Commissioner;* and it further appearing that said Keystone Mutual Casualty Company, *is insolvent and in such condition that its further transaction of business would be hazardous* to its policyholders or its creditors or to the public, there is hereby entered the following:

FINAL DECREE

AND NOW, June 26, 1947, it is ORDERED, ADJUDGED AND DECREED that the business of said Keystone Mutual Casualty Company be "closed and the Insurance Commissioner of the Commonwealth of Pennsylvania be, and he hereby is, directed to take possession of the property of Keystone

Mutual Casualty Company in accordance with the provisions of the Act of the General Assembly of May 17, 1921, (P.L. 789); that the said Keystone Mutual Casualty Company be hereby dissolved, its charter vacated and its corporate existence ended, and its business and affairs liquidated by and under the direction of the said Insurance Commissioner of the Commonwealth of Pennsylvania."

Notwithstanding these facts, on June 10, 1950 the succeeding Insurance Commissioner employed Wolfe, Corcoran & Linder, consulting actuaries and insurance accountants, to make an evaluation of the assets and liabilities of this company. The report of this firm (the so-called Linder Report) sets forth *as of June 30, 1950*,—not as of June 30, 1947—the company had a surplus of $589,722.80 and as of May 30, 1951, of $444,808.93. In reliance upon the Linder Report the succeeding Insurance Commissioner, Artemas C. Leslie, and the succeeding Attorney General, Charles J. Margiotte, on *December 18, 1950*, filed the present petition to vacate the Court's decree of dissolution dated *June 26, 1947*.

This petition to vacate affirmatively alleges that the Casualty Company was solvent on June 26, 1947, as well as on the date of the petition and that the Court's decree dated June 26, 1947, was entered under a mistake of fact and was therefore void. Petitioner has the burden of proving the facts alleged: *O'Neill v. Metropolitan Life Insurance Co.*, 345 Pa. 232, 26 A. 2d 398; *DeReeder v. Travelers Insurance Company*, 329 Pa. 328, 198 A. 45; *Berritz v. New York Life Insurance Company*, 169 Pa. Superior Ct. 496, 52 A. 2d 363. Moreover the new Insurance Commissioner, acting through the new Attorney General of the Commonwealth, was seeking to vacate a decree of a Court of Record, and in such case the burden of proof is a heavier one; the evidence must be clear, positive, and so convincing as to move a Court of Equity to grant the relief prayed for: Cf. *Bosler v. Sun Oil Company*, 325 Pa. 411, 191 A. 718; *Exchange Bank & Trust Co., Trustee v. Bartley*, 350 Pa. 585, 39 A. 2d 833.

The principles of law applicable to petitions to open judgment are equally applicable to a petition to vacate a decree and the grant or refusal of such a petition is within the

discretion of the Court below and its decision will not be reversed except where there is a manifest abuse of discretion.

"An application to open a judgment is addressed to the equitable powers of the court, and if, on the pleadings and proofs, doubt exists as to the real justice and equity of the case, the court below will not be reversed on appeal: Massey v. Massey, 267 Pa. 239, 242; Tressler v. Emerick, 278 Pa. 128, and cases cited": *Reidlinger v. Cameron*, 287 Pa. 24, 27, 134 A. 418.

". . . the grant or refusal of a motion to open judgment rests entirely within the discretion of the court below and will not be disturbed except where there is manifest abuse of discretion": *Perri v. Perri*, 335 Pa. 394, 6 A. 2d 775; *Schuylkill Trust Co. v. Sobolewski*, 325 Pa. 422, 190 A. 919.

In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921,* and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard. These are so closely related that they will be considered together.

What are the pertinent and important statutory requirements? Section 502 of the Insurance Department Act of May 17, 1921,* provides: "Whenever any domestic insurance company, . . . (a) *is insolvent;* . . . or (e) is found, after an examination, to be in such condition that *its further transaction of business will be hazardous* to its policyholders, or to its creditors, or to the public; *or* (f) *has wilfully violated its charter or any law of the Commonwealth;* . . . the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas . . . for an order directing such company to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, *and for such other relief as the nature of the*

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* P. L. 789, as amended, 40 PS 202.

case and the interests of its policyholders, creditors, stockholders, or the public may require."

Section 506 provides: "If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property . . ."

The fundamental requirements of due process in a proceeding affecting property interests are (1) a notice or proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties, and (2) an opportunity to be heard. *Anderson National Bank v. Luckett*, 321 U. S. 233; *Dohany v. Rogers*, 281 U. S. 362, *Ballard v. Hunter*, 204 U. S. 241; *Union Trust Co. of Pittsburgh* case, 359 Pa. 363. Notwithstanding the indisputable fact that the company had full knowledge of the proceedings and had received an appropriate notice thereof and was given ample opportunity to be heard therein, neither the company nor its directors nor officers nor policyholders nor the present intervenors appeared or made any objection to the proposed liquidation of the company or to the decree of the Court below for a period of over 3½ years. Indeed, the present petition to vacate does not allege or raise any issue as to lack of notice or opportunity to be heard, but merely alleges a mistake as to the solvency of the company; the issue of due process was raised for the first time during the argument before the Court en banc. The reasons why this issue was previously raised must be obvious; there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process.

With respect to the statutory requirements, appellant contends that no order to show cause was issued or served and no notice of the Court proceedings and no copy of the Suggestion of the Attorney General was given to the company or to any of its officers or directors; and that there was no full hearing before the Court as required by the Insurance Code. It is indisputable that the officers and directors of the company knew and admitted in the middle of June

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1947 that the company was insolvent and in an unsound, hazardous condition; it is indisputable that on June 24, 1947, the Board of Directors of this company requested the Insurance Commissioner of Pennsylvania to immediately take charge of the affairs of the company in order to conserve its assets for the benefit of all concerned; it is indisputable that the officers and directors of the company knew that the Attorney General of the Commonwealth was holding a hearing on June 25, 1947, for the purpose of having possession of the company taken over by the Insurance Commissioner; and it is indisputable that on June 25, 1947, at the hearing in the Attorney General's office the attorney for the company appeared and notified the Attorney General that the company could not raise sufficient additional funds to rehabilitate the Company and that all its officers and directors had resigned; it is indisputable that the attorney for the company on June 25, 1947, in the office of the Attorney General, waived in writing * issuance of any rule in the proceedings and notice thereof, and accepted service of the rule and notice, and consented to the granting of relief prayed for in the within suggestion to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company adopted June 24, 1947, ** a copy of which was thereto attached; and it is likewise indisputable that on June 26, 1947, the day of the Court's decree, the attorney for the company waived in writing the issuance of an order or rule to show cause and notice and thereafter entered a general appearance for the company and consented in writing to the Court's order delivering possession of the company to the Insurance Commissioner of Pennsylvania.

In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be

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* This waiver was signed by the attorney for the company and for N. P. Kann, who is Secretary of the Company and Chairman of the Finance Committee and its leading Director, as well as the company's then authorized agent and attorney-in-fact.

** Appellant seeks to limit this consent to a taking of possession of the company for conservation and rehabilitation instead of for liquidation of the company.

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stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it.

Having determined that the decree of the Court dated June 26, 1947, was validly entered, the next question to arise is what clear, positive and convincing evidence did the Commonwealth or the intervenors produce to justify a vacation or even a modification of the decree? The Commonwealth in the Court below and the intervenors in this Court have attempted to establish one point and one point only, viz., that the company was solvent on June 26, 1947, as well as at the time of the filing of the petition to vacate on December 18, 1950, and as of the time of the trial in May, 1951. Their proof consisted of two kinds: (1) An attempt to show that the report of the special examiners in June, 1947, did not prove insolvency and hence did not justify the Court's decree of June 26, 1947, and (2) by producing a report by actuaries appointed by the succeeding Insurance Commissioner showing the financial condition of the company *as of December, 1950,* and using this as a basis to establish—by reconstructing and adjusting certain items therein—insolvency as of June, 1947.

The Court below found that the report of the special examiners in June, 1947 as well as the Linder report of December, 1950, were, for reasons hereinafter discussed, inaccurate and undependable. Such a finding, without more, would not be sufficient to satisfy the intervenors' burden of proving that the company was solvent on June 26, 1947, and in December, 1950 (or at the time of the trial), or that the company was not in an unsound and hazardous condition in June, 1947, and in December, 1950.

The Court below specifically found upon competent and adequate evidence:

"76. This company was *insolvent on December 30, 1950,* and there has been no statement of assets and liabilities giving a comparison of the financial condition at the time

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of the hearing as compared to the date of the admitted insolvency.

55. The computations of the actuarial experts in this case are complex and conflicting and they do not establish, either individually or collectively, that this company was solvent on June 26, 1947. On the contrary, it is established that this *company was in an unsound financial condition on June 26, 1947.*

78. The finances of this company were in an unsound condition at June 26, 1947 from the standpoint of this company's policyholders, the creditors and the public as well.

79. There was *gross mismanagement* of this company's affairs, including the misstatement of the financial condition to the insurance authorities of this State and other States, and the maintenance of inadequate claim records.

80. This company prior to June 26, 1947 had wilfully violated the laws of this Commonwealth, in that its officers committed criminal acts for which they were convicted in connection with the manipulation of the company's records.

81. As of June 26, 1947, the officers and directors of this company had ceased to function, and therefore the company was without any active management or ability to continue to operate as a going concern.

82. On June 26, 1947 the transaction of further business would have been hazardous from the standpoint of the security and protection of the policyholders, creditors and the public as well.

* * * * * * *

86. It is not established that this company was solvent at the time of the hearing in this case."

Appellant does not and cannot challenge or refute the finding of gross mismanagement, maintenance of inadequate claims records, unsound practices, criminal misstatements of the company's financial condition, violation of its charter and of the law, or that the company was in June, 1947, in an extremely hazardous condition. It challenges only those findings pertaining to insolvency; it seeks equitable relief, in the last analysis, on the sole ground of solvency then and now. In view of the findings of the Insurance

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Commissioner and of the Court in June, 1947 and of the admissions of the company's officers and directors of the insolvency of the company in June, 1947, which was acquiesced in by 26 States, it would take strong evidence at this late date to overcome these facts and to prove that the company was solvent in June, 1947. The trial judge and the Court en banc found that no such evidence was produced.

The difference between the examiners and other experts as to the solvency or insolvency of the company revolves principally around two liability items (1) "reserves for liability", and (a) "the unearned premium reserve." The Court below found that the examiners' report showing as of June, 1947, an additional reserve for liability and compensation losses in the amount of $1,511,255.93, was inaccurate and undependable, for the reason in substance that it was based upon a case-by-case examination of only 175 claims out of several thousand claims and some erroneous computations therefrom. The claims records of the company in the remaining claims were so inadequate and contained such meager information that an accurate case-by-case determination was impossible and consequently the examiners determined the balance of necessary reserves on a percentage method derived from the percentage of undervaluation found in the aforesaid 175 claims. The Court below found that this item in the report was necessarily inaccurate and that some of the computations were erroneous, without determining whether the "reserves for liability" was higher or lower than that found by the examiners, or what it actually amounted to, or what the actual deficit of the company was. Such a mistake was not conclusive proof on the important issue of solvency; it is not sufficient proof that the financial condition of the company was not what it was represented to be and what its officers and directors admitted it to be merely because some part of the examiners' report was inaccurate. Moreover, the Court specifically found that the company in June, 1947 was in an unsound financial condition and the transaction of further business would have been hazardous to policyholders, creditors and public alike.

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The other item upon which the examiners and other expert witnesses strongly disagreed was the inclusion or exclusion in the company's reserve for unearned premiums of an item of $281,632.60 which was set up by the examiners as an additional reserve for advance premium deposits. We have studied the conflicting testimony on this issue and believe it sufficient to say that we agree with the court below that "we do not feel that the Commonwealth has met the burden imposed upon it of (clearly proving) that the item of $281,732.60 was improperly included as a liability by the examiners in their reserve for unearned premiums."

The Court below also refused to accept the Commonwealth's so-called "Linder Report" and the inferences therefrom as sufficient to establish that the company was solvent either on June 26, 1947, or on December 18, 1950. It would unnecessarily lengthen this opinion to analyze and review the controversial Linder report, which the lower Court discussed at great length and found insufficient to clearly establish solvency either in December, 1950, or in June, 1947. We agree with and adopt the following excerpt from the Opinion of the Court below:

"There has been no balance sheet submitted on behalf of the Commonwealth showing the assets and liabilities of the company as of December 31, 1946. The method used by the Commonwealth in making limited use of disputed figures to establish a surplus without the use of a balance sheet is not (convincing). One cannot read this record and form a valid conclusion that this company was solvent on June 26, 1947. Any adjudication on the basis of the evidence before this Court that there was solvency as of that date would be based upon pure conjecture.

The sum total of the evidence indicates that this Company was in a precarious financial condition on June 26, 1947. Its affairs were mismanaged, its records manipulated, and its financial condition "had been fraudently misrepresented by its officers. These conditions, taken in connection with the admissions of insolvency made by its officers to the Insurance Commissioner, make us firm in our conviction that in order to prevail in its petition to vacate our decree, the Commonwealth must meet the burden . . .

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of affirmatively proving the solvency of this company as alleged in the petition."

The findings of the Court below are supported, we repeat, by competent and adequate evidence. Moreover, they are buttressed by the important admissions made by the Insurance Commissioner of Pennsylvania in filing a Federal income tax return for the company for 1950 which showed that the company was insolvent at the time when he claims in this suit it was solvent.

While appellant objected to the admission of this income tax return, it was clearly admissible as an admission against interest, thus affecting both the weight and credibility of the testimony.

All of the other contentions of each of the parties in this unusually complicated case have been considered, but further discussion is deemed unnecessary.

Order affirmed: appellant-intervenors to pay the costs.

Justice CHIDSEY did not participate in the consideration or decision of this case.

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APPENDIX "B"

OPINION OF THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED NOVEMBER 22ND, 1950

Nos. 20, 21 and 22

May Term, 1951

In Re COMMONWEALTH OF PENNSYLVANIA, ex rel., T. McKEEN CHIDSEY, Attorney General,

v.

KEYSTONE MUTUAL CASUALTY COMPANY

No. 20—APPEAL OF CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania

No. 21—APPEAL OF ARTENAS C. LESLIE, Insurance Commissioner of the Commonwealth of Pennsylvania

No. 22—APPEAL OF ROLAND O. HAINES, EDWARD CHADDERTON, EDMOND J. DWYER, HAROLD KANE and JOHN D. O'NEIL, constituting the Keystone Mutual Policyholders' Committee

Appeals from Order of the Court of Common Pleas of Dauphin County, Pennsylvania, at Commonwealth Docket No. 129 of 1947

OPINION

STEARNE, *J.*:

There are three appeals from the refusal of the Court of Common Pleas of Dauphin County to permit the intervention of a policyholders' committee in a dissolution and liquidation proceeding relating to the Keystone Mutual Casualty Company, a Pennsylvania corporation. Appellants are the Commonwealth's Attorney General, its Insurance Commissioner and the Committee. The Statutory Liquidator interposes no objection to the intervention but

reserves his right to question the validity of any plan of rehabilitation. The Ancillary Receiver for the State of Maryland intervened as a party defendant in opposition to any plan of rehabilitation.

The reasons which motivated the Court to deny the intervention may be thus summarized: (a) a decree of dissolution was entered by the Court; (b) that after corporate dissolution there can be no reestablishment of the corporate entity; (c) that there is no authority for the proposed plan to turn over the assets to officers and directors of the dissolved company; (d) that an intervenor takes the litigation "as he finds it" and this petition is in effect "an attack upon the proceedings" and is in the nature of a bill for review. Perhaps the foundation of the Court's objection is, as stated in its opinion, "*Were we to allow this petition, we would be required to hear evidence and pass upon the validity of our decree (of dissolution)* * * *."

On June 26, 1947, upon suggestion filed by the then Attorney General, and with the consent of the company, "(The) Court, by order dated June 26, 1947, ordered and directed the Keystone Mutual Casualty Company to be dissolved, and directed that the Insurance Commissioner of this Commonwealth take possession of the assets of the company, as Statutory Liquidator, in accordance with the provisions of Section 506 of the Insurance Department Act of May 17, 1921, P. L. 789, as amended, 40 P. S. Sec. 206. The Court ordered that the company be closed, its charter vacated and its corporate existence ended, and further directed that its business affairs be liquidated by and under the direction of the Statutory Liquidator."

On June 2, 1947, a policyholders protective committee was granted leave to intervene. In its petition it was averred that the Committee believed that the company was not insolvent; that its assets far exceeded the liabilities and expressed the belief that reinstatement and rehabilitation of the company was "feasible". This Committee consisted of six members representing policyholders, and whose chairman was Duverney Matlack and was thereafter referred to as the Matlack Committee. On *February 21, 1950* the court granted permission to this Committee to withdraw as inter-

vening party "* * * with leave to make further appearance at a later date for the purpose of requesting an appropriate allowance for expenses and counsel fee of said Committee * * *". On *March 10, 1950* the present application to intervene was made by five authorized individuals, as a Policyholders' Protective Committee, which was denied as indicated. This appeal followed.

Policyholders of a mutual insurance company are interested parties. Such a company is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured. Upon insolvency of the company the policyholders, as members, are liable for their proportionate share of indebtedness: 44 C. J. S., Insurance, Sec. 104, p. 644, et seq. In a *dissolution* there can be no doubt but that such individuals are interested parties. Under the Rule of Civil Procedure 2327, 12 P. S. Appendix, such persons are permitted to intervene because the proceeding may impose liability upon them. As stated in the commentary to the rule, the right to intervene is not a grant of an absolute right "without regard to the approval of the court." Cf. In re *Frey's Estate*, 237 Pa. 269, 85 A. 147; *Northampton Trust Company, Trustee v. Northampton Traction Co. et al.*, 270 Pa. 199, 112 A. 871; *Bily, Ex'x. v. Allegheny County Board of Property Assessment*, Appeals and Review, 353 Pa. 49, 44 A. 2d 250. Rule 2328 requires a petition to intervene "*setting forth the ground on which intervention is sought*". Rule 2329 provides that the application may be refused by the court: (1) if not in subordination to and in recognition of the propriety of the action; (2) the interest of petitioner is already adequately represented; (3) undue delay in making application.

In compliance with these rules the petition, dated *March 10, 1950*, recited the above facts; that because of the withdrawal by leave of court of the prior Policyholders' Protective Committee on *February 21, 1950* the policyholders no longer had representation in the proceeding; that the corporation was in fact solvent, and not insolvent as was represented to the court. In an amended petition a detailed plan of proposed rehabilitation was set forth.

We have then petitioners who possess the status of intervenors and pleadings which comply with the applicable rules

of civil procedure. These petitioners are not officious intermeddlers in litigation in which they have no interest. It does not necessarily follow that if intervention is permitted, the court is required to grant permission to rehabilitate. If the corporation is insolvent, and its charter forfeited, it may be beyond the power of the court to permit a rehabilitation or reorganization.

The objection which appears to be the most formidable is whether under Procedural Rule No. 2329 (1) this application "*is not in subordination to and in recognition of the propriety of the action.*" The general rule is that an intervenor must take the suit "as he finds it". *Northampton Trust Company, Trustee, v. Northampton Traction Co., et al.*, 270 Pa. 199, 112 A. 871. Cf. *Franklin National Bank et al.* v. *Kennerly Coal & Coke Co.*, 300 Pa. 479, 483, 150 A. 902.

It is noted that in both petitions to intervene (June 2, 1948, Matlack Committee and the present one Haines Committee) the averment is made that the corporation is solvent. Furthermore the decree of insolvency and dissolution *was based entirely upon a consent decree.* The court was not required *to find facts* on which to base its decree, because of such consent of the officers of the corporation, *who thereupon resigned.* We agree with the learned court below that an intervenor should not be allowed to become a party to the suit merely to review what the court has done and to require demonstration of the legality and propriety of its action. But *arguendo*, if an intervenor sought to establish that a group of insurance companies had contributed a fund to pay all debts and costs of an insolvent insurance company, ought such intervention be denied? Under such circumstances why should the decree of dissolution not be vacated and the company rehabilitated? In the absence of good reason to the contrary we think not. If it were shown that the company was and is *solvent* and the decree was entered because of fraud, accident or mistake, intervention should not be denied. Such proofs would not be in derogation of the decree filed. As this was a *consent decree* it might be shown that the decree was improvidently made and upon erroneous information. We agree that an intervenor cannot question supported findings of facts made

prior to the intervention. But neither the court below nor an appellate court should pass upon the propriety of the proposed rehabilitation *prior to intervention*. If the corporation is insolvent, it may well be that no rehabilitation is possible under the Insurance Statute, supra.

Policyholders are not now represented in these proceedings. Their rights are now being considered by the court and their property is about to be distributed. We see no reason why a policyholders' committee should not intervene, if for no other purpose than to protect such interest.

There has been no undue delay. The policyholders were protected by the Matlack Committee until it was permitted to withdraw, February 21, 1950, and promptly, on March 10, 1950, the present application was made.

Curiously enough the only ones objecting to intervention are two *amici curiae*, one of whom is E. Brooke Matlack, *who was chairman of the Matlack Committee*. In his brief, so filed as *amicus curiae*, it is said that he "*will argue in behalf of himself and of all policy holders, creditors and claimants.*" It is further stated that Mr. Matlack is the largest policyholder-creditor who desires nothing more than the expeditious liquidation of the dissolved company and the payment of claims to the extent that the assets will permit.

We are unable to ascertain from this record the identity of the other *amicus curiae* but whoever he is he was represented by an able member of the Philadelphia Bar who states in his argument: "The Petition to Intervene by this alleged policyholder's committee is a bold and brazen attempt to seize substantial assets of a defunct insurance company. It represents an attempt by a small group to seek professional treatment in contravention of law. The purported sponsorship of the intervention by the present Attorney General and Insurance Commissioner is shocking. The appeal lacks merit."

It is difficult to understand how the petitioning committee, if permitted to intervene, could possibly secure possession of the assets. The funds are in the hands of the Statutory Liquidator and are, therefore, under the direct supervision of the court.

It is most persuasive that the Commonwealth's Insurance

Commissioner, as well as its Attorney General, join the committee in this appeal. No sound reason has been presented why the intervention should not be allowed. Great loss could result from a denial of intervention and no harm can result if allowed. Policyholders, because of their pecuniary interest, are entitled to have representation in this litigation even though ultimately there is a liquidation and distribution of assets.

We specifically withhold judgment on the question whether rehabilitation is proper under the circumstances, as well as approval of any proposed rehabilitation or reorganization.

The decree is reversed and the record is remitted to the court below to enter an appropriate decree in accordance with this opinion. All costs to be paid out of the fund.

APPENDIX "C"

FULL TEXT OF PENNSYLVANIA STATUTES THE VALIDITY OF WHICH IS DRAWN IN QUESTION

Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789, Secs. 213, 321, 501, 502, 503, 504, 505, 506, and 507, 40 P. S. 51, 131, 201, 202, 203, 204, 205, 206, and 297.

"Section 213 (40 P. S. S. 51). (As amended by the Act of May 24, 1933, P. L. 982). EXAMINATION OF COMPANIES, ET CETERA.—The Insurance Commissioner shall require every domestic insurance company, association, and exchange to keep its books, records, accounts and vouchers in such manner that he or his authorized representatives may readily verify its annual statements, and ascertain whether the company, association, or exchange has complied with the provisions of law. He shall, every three years, or oftener if he deems it to be necessary, personally or by his deputy, actuary, or examiners, visit each domestic insurance company, association, and exchange, and thoroughly inspect and examine its affairs to ascertain its financial condition and its ability to fulfill its obligations, whether it has complied

with the provisions of law, and any other facts relating to its business methods and management, and the equity of its plans and its dealings with its policyholders. He may, in like manner, when he determines it to be prudent for the protection of policyholders in this Commonwealth, compel the attendance of officers or visit and examine, in person or by his deputy or examiners, any insurance company, association, or exchange of another State or foreign government applying for admission or already admitted to do business in this Commonwealth.

In lieu of such examination, the Insurance Commissioner may accept the report of examination made by or upon the authority of the supervising official of any other State.

The Insurance Commissioners shall grant a hearing to the corporation or other insurer or organization examined before filing such report, and may withhold any such report from public inspection for such time as he may deem proper, and may, if he deems it for the interest of the public to do so, publish any such report or the results of any such examination as contained therein in one or more newspapers of the State."

"(d) IMPAIRMENT OF CAPITAL AND RESERVES. Section 321 (40 P. S. S. 131). NOTICE OF IMPAIRMENT OF FUNDS.—Having charged as a liability the reinsurance and loss reserves as above defined for insurance companies and exchanges of this Commonwealth other than life insurance companies, and adding thereto all other debts and claims against the company or exchange, the commissioner shall, in case he finds the capital or reserve of the company or exchange impaired twenty per centum, give notice to the company or exchange to make good the capital or reserve within sixty days."

"Section 501 (40 P. S. S. 201). (As amended by Act of June 22, 1931, P. L. 616). SUSPENSION OF BUSINESS OF INSURANCE COMPANIES, ET CETERA, BY INSURANCE COMMISSIONER.—The Insurance Commissioner shall suspend the entire business of any domestic insurance company, association, or exchange, fraternal benefit society or beneficial society, and the business within this Commonwealth of any insurance company, association, or exchange, or fraternal

benefit society or beneficial society of another State or foreign government, during its non-compliance with any provision of law obligatory upon it, or whenever he shall find that its assets are insufficient to justify its continuance in business, by suspending or revoking its certificate of authority granted by him. If such insurance company, association, or exchange, fraternal benefit society or beneficial society was incorporated, organized, or is operating without authority of law, the commissioner shall have equal authority to suspend or dissolve as if a certificate of authority had been granted by law. If upon examination or other evidence exhibited to him, the Insurance Commissioner is of opinion that any insurance company, association, or exchange, or fraternal benefit society or beneficial society, or an officer or agent thereof, has violated any provision of the insurance laws, he shall report the facts to the Attorney General, who, under the direction of the Insurance Commissioner, shall take such legal action as the case may require."

"Section 502 (40 P. S. S. 202). (As amended by Act of July 12, 1935, P. L. 958.) APPLICATIONS TO COURT TO TAKE OVER BUSINESS OF COMPANIES, ET CETERA, FOR PROTECTION OF POLICYHOLDERS, CREDITORS, ET CETERA.—Whenever any domestic insurance company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner or which are doing, or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth, or which are in process of organization intending to do such business there—(a) is insolvent; or (b) has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the Insurance Commissioner or his deputy or examiner; or (c) has neglected or refused to observe an order of the Insurance Commissioner to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock company, or its reserves, if it be a mutual company, an association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order shall have become impaired; or (d) has, by contract of reinsur-

ance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order, without having first obtained the written approval of the Insurance Commissioner; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the Commonwealth; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) was incorporated, organized, or is operating without authority of law, the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County, or to the court of any county in which the principal office of such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order is located, for an order directing such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case the interests of its policyholders, creditors, stockholders, or the public may require."

"Section 503 (40 P. S. S. 203). NONPAYMENT OF JUDGMENTS BY MUTUAL COMPANIES; ASSESSMENT OF POLICYHOLDERS; DISSOLUTION.—Whenever proof shall be submitted to the Insurance Commissioner showing that any execution against any mutual insurance company of this State, in pursuance of judgment obtained against said company in any court of record of this Commonwealth, has been returned nulla bona by the sheriff of the county in which said company is located, it shall be his duty to notify the Attorney General, who thereupon shall apply to the court of common pleas of Dauphin County, or to a judge thereof in vacation, for an order upon such company to show cause why its

business should not be closed. Upon the hearing of such rule or order, the court or judge aforesaid shall direct the officers of said company to assess and collect from the policyholders thereof a sum sufficient to satisfy said judgment and execution and all other claims against said company, or to make any other order or orders in the premises as may appear to said court or judge just and necessary. In case it shall finally appear to said court or judge that the company aforesaid cannot collect from its members sufficient funds to satisfy the claims against it, the said company shall be adjudged insolvent, and the court or judge aforesaid shall decree its dissolution, and appoint the Insurance Commissioner as receiver to take charge of its effects with like powers as hereinafter provided."

"Section 504 (40 P. S. Sec. 204). SERVICE OF PROCESS.—The order to show cause, and the papers upon which the same is made in any proceeding instituted under the provisions of this act, shall be served upon the company, association, exchange, society, or order named in such order in the manner prescribed for personal service of summons upon a domestic corporation by the laws of this Commonwealth. When it is satisfactorily proved by affidavit that the officers of the company, association, exchange, society, or order named in the said order to show cause, upon whom service is required to be made as above provided, shall have departed from the State, or keep themselves concealed therein with intent to avoid service, such order to show cause may provide for service thereof in manner as the court or judge by whom the same is made shall direct."

"Section 505 (40 P. S. Sec. 205). INJUNCTION; RETURN OF ORDER TO SHOW CAUSE AND DECREES THEREON.—On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company, association, exchange, society, or order from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing before the court or before an examiner appointed by the court, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company, asso-

ciation, exchange, society, or order, and retain such possession and conduct such business until, on the application either of the commissioner, through the Attorney General, or of such company, association, exchange, society, or order, it shall, after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the company, association, exchange, society, or order can properly resume possession of its property and the conduct of its business."

"Section 506 (40 P. S. Sec. 206). (As amended by the Act of June 12, 1951, P. L. 515.) ORDERS FOR LIQUIDATION OF AFFAIRS OF COMPANIES, ET CETERA; INSURANCE COMMISSIONER TO ACT AS RECEIVER.—If on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, association, exchange, society, or order, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title of all of the property, contracts, and rights of action of such company, association, exchange, society, or order as of the date of the order so directing him to liquidate. The filing or recording of such order in any record office of the State shall impart the same notice that a deed, bill of sale, or other evidence of title, duly filed or recorded by such company, association, exchange, society, or order, would have imparted. The order of liquidation shall, unless otherwise directed by the court, provide that the dissolution of the company, association, exchange, society, or order shall take effect upon the entry of such order in the office of the clerk of the county wherein such company, association, exchange, society, or order had its principal office for the transaction of business. Within thirty days after the taking effect of an order of liquidation of any stock or mutual fire insurance company, association or exchange, the Insurance Commissioner shall mail a notice thereof to each of its policyholders or members."

"Section 507 (40 P. S. Sec. 207). INSURANCE COMMISSIONER TO SUPERSEDE OTHER RECEIVERS—Whenever a receiver of an insurance company, association, exchange,

society, or order is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company, association, exchange, society, or order."

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